No. 139.

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Supreme Court of the United States

Filed Nov. 17, 1902.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS, DEFENDANT IN ERROR.

October term, 1902. No. 139.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR

and

POINTS ON MOTION TO DISMISS OR AFFIRM.

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BRIEF FOR PLAINTIFF IN ERROR.

I.

This case involves the question of the validity of certain provisions of an Act of the Legislature of the State of Michigan, and the power of the Railroad Commissioner of the State, acting under such provisions, to impose upon the plaintiff in error the burden of installing and maintaining certain gates and other safety crossing devices at a crossing of the tracks of the plaintiff in error by a steam railroad, and the questions arise upon the following facts: The plaintiff in error is a street railway company, pure and simple, and organized under the provisions of Chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and owned and owns and operates a street railway in the City of Detroit, and, among other streets, on Clark Avenue in said city. It is the successor in such ownership and operation of a company known as the Fort Street and Elmwood Avenue Railway, which was also a street railway corporation. The street railroad was constructed on Clark Avenue in 1866 under certain municipal grants by which the predecessor company obtained the right to construct, maintain and operate its line of street railway in said street

and immediately thereafter constructed and put its road in operation. The grant was the ordinary street railroad grant. There was no public highway or street crossing on Clark Avenue when the street railroad was constructed between what is known as the River Road and Fort Street, nor was there any railroad or other crossing for a number of years thereafter.

In 1883 the Wabash Railway Company, as it is familiarly known, approached Clark Avenue on the private right of way acquired by it, and constructed its track across Clark Avenue at the point in question, proceeding thence to the center of the city. No safety devices of any character were then installed by the Wabash Railroad Company, though it was the junior company. Subsequently, the steam railroad tracks at the crossing in question were increased to three. The Union Depot was built at the Wabash terminus in the center of the city, for the accommodation of three of four important steam railroads entering the city, and what was known as the Union Terminal Association obtained control of the tracks crossing Clark Avenue, and the steam railroad business had so increased in volume that thirty-eight steam railroad passenger trains per day were crossing over Clark Avenue at this point at time the Commissioner made the order in question. The street railroad of the plaintiff in error some time before the steam railroad was built, was changed from a single to a double track. The section of the city in the neighborhood has increased somewhat in density of population and there has been a considerable increase of travel on the streets.

The foregoing facts are stated in the amended petition contained on pages 11 to 17 of the Record, and in an agreed Statement of Facts commencing at the bottom of page 17 to the top of page 18 of the Record.

II.

In 1889 the Legislature passed an Act requiring all street railway cars to be stopped before going upon a street railway crossing of a steam railway track and requiring the man in charge of the car to see whether any train was approaching on the steam railway before crossing. It forms Sec. 32 of the Street Railway Act. In 1893 the State Legislature passed an Act entitled "An Act to regulate the construction of the tracks of railroads and street railroads across each other, and the stringing of wires, elec-

tric or other, over railroad tracks, and relative to the maintenance of such tracks heretofore so constructed and wires heretofore so strung." The Act contains seven sections, as follows:

The people of the State of Michigan enact:

(361) 6349. Section 1. That it shall hereafter be unlawful for any railroad company to construct its tracks across the tracks of any street railroad, or for any street railroad company, whether operated by horses, cable, electricity, or other motive power, to construct its tracks across the tracks of any railroad company until the place where and the manner in which such crossing shall be made shall have been approved by the Commissioner of Railroads.

(362) 6350. Section 2. Any railroad company or street railroad company desiring to make any such crossing shall give the company whose tracks are to be crossed notice in writing of the place where and the manner in which it desires to make such crossing, and the place where and the time when it will apply to the Commissioner of Railroads for approval thereof, which notice shall be served at least ten days before the hearing of the proposed application.

363) 6351. Section 3. Such crossings shall, in all cases where the Commissioner of Railroads deems it reasonably practicable, be made otherwise than at grade, and in accordance with plans to be approved by said Commissioner; and when made at grade said Commissioner shall prescribe the safeguards which shall be provided by the company desiring to make such crossing, to prevent accidents thereat.

(364) 6352. Section 4. It shall hereafter be unlawful for any corporation or person to string any wire, electrical or other, over the tracks of any railroad company, except at such places and in such manner as shall be approved by the Commissioner of Railroads, and any corporation or person desiring to so string any wire shall give the railroad company notice in writing of the place where and the manner in which it desires to string the same, and the place where and the time when it will apply to the Commissioner of Railroads for his approval as above required, which notice shall be served at least ten days before the time of hearing of such application.

(365) 6353. Section 5. The Commissioner of Railroads shall, as soon as possible after the passage of this

Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.

(366) 6354. Section 6. Said Commissioner shall also, as soon as possible after the passage of this Act, either by personal examination or otherwise, obtain information as to all places where the tracks of railroads are crossed by wires strung over said tracks, and wherever, in his judgment, such wires should be raised to a greater height or other thing done with reference thereto, to guard against accidents, he shall order such change or changes to be made, and shall apportion any expense incident thereto between the companies or persons affected as he may deem just and reasonable; Provided, That in no case shall the height of any wire strung across such railroad (tracks) track be less than twenty-two feet from the established grade of said railroad tracks.

(367) 6355. Section 7. It shall be the duty of every corporation and person to whom an order made by the Commissioner of Railroads under this Act shall be directed, to comply with such order in accordance with its terms, and for any neglect to so comply therewith any such corporation or person shall be liable to a penalty of one hundred dollars and to a like penalty for every ten days during which said neglect shall continue. Any such penalty may be recovered in an action of assumpsit brought in the name of the people of this State, and it shall be the duty of the prosecuting attorney of the proper county to bring any such action at the request of the Commissioner of Railroads.

Approved May 31, 1893."

This Act has continued in force from the date of its passage. Some time prior to the 7th of March, 1900, the Common Council of the City of Detroit applied to the Commissioner of Railroads for an installation of additional protection at the Clark Avenue crossing of the tracks of the Union Terminal Association, being the tracks in question, and, pursuant to such application, the Railroad Commissioner personally inspected the premises, and after such inspection made the order complained of in this case, which will be found on pages 7 and 8 of the Record. It

will be noted that this order was made upon the application of the city authorities without referring in any way to the plaintiff in error, and referring solely to the tracks of the Union Terminal Association and the street crossing, and it will be further noted that the order recites only that the Commissioner heard the city officials of Detroit and the arguments of the attorneys and representatives of the Union Terminal Railroad at the inspection. The order seeks to impose one-half the cost of installing and maintaining the safety appliances upon the plaintiff in error, and paragraph 5 of the answer of the defendant in error, found on pages 9 and 10 of the Record, distinctly bases the authority for the order in question upon Section 5 of the Act above quoted.

While it is true that the plaintiff in error was informed of the inspection, and the manager simply appeared to object, yet it is evident from the tenor of the order that the Railroad Commissioner did not, so far as any hearing was concerned, consider the street railroad company, or anybody else, as entitled to notice, and the order does not recite that any notice was given. The section in question does not provide for any notice or hearing.

It is to be further noted that the defendant in error bases its decision upon the requirements of public interests and the additional protection at the crossing of the Union Terminal Association tracks and Clark Avenue. The plaintiff in error sought to have the order of the Railroad Commissioner set aside or modified by a writ of mandamus from the Supreme Court of the State.

III.

The grounds upon which the validity of the order was attacked were:

(a) That it was the settled constitutional law of Michigan that the street railroad does not constitute an additional burden upon the highway, but is simply a method of using the highway for public travel and in direct furtherance of the purpose for which the highway was established; that the street railroad company in contemplation of the law bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any other method of public or private travel, and cannot, as between others using the highway for like purposes, be required alone to

bear the expense of installing and maintaining safety devices at steam railroad crossings designed for the protection of all the traveling public.

(b) And as a further principle well established in Michigan the junior road seeking to cross another, and consequently the primary cause of such danger as may arise from such crossing, cannot shift any portion of the burden of maintaining safety devices and appliances upon the senior road without compensation, and that this doctrine must apply, even though at the time the crossing was first made the senior road did not insist upon the installation of safety crossing devices, though the law required it; that the dangerous condition which arose from the construction of steam railroad tracks was in the nature of a nuisance created by the steam railroad company, and which must be bound to take the necessary precaution to prevent accidents, and it mattered not whether the danger existed at the time of the building of the steam railroad tracks or arose afterwards from an increase in the number of tracks or a great increase in the use of the tracks.

(c) The provisions of the Michigan statute which in terms conferred the jurisdiction upon the Railroad Commissioner to make the order in question is unconstitutional and void because it did not constitute due process of law, the particular objection being that the law does not require that the Railroad Commissioner, either in the investigation or inspection of the crossing, or in the fixing of the safety appliances to be installed, *or the adjudication as to the persons who shall bear the expense thereof,* shall give notice to the parties and grant any hearing; that requiring the street railroad company to pay a very large annual expense without the law requiring the officer to give notice and give a hearing, is not due process of law within the meaning of the constitutional provisions and the decisions; that it matters not that the Commissioner may have attempted to give notice or may have had an informal hearing at which the defendants may or may not have appeared, and in which they may or may not have participated, is not sufficient. There must be authority derived from the statute requiring notice and hearing, otherwise it is void. These points were urged. Two opinions were filed by the Supreme Court of the State; the one, that of the bare majority of the court, fairly follows the argument in support of thq position of the counsel for the defendant in error upon the first question.

The opinion of the minority of the court strongly supports the propositions contended for by counsel for the

plaintiff in error. These opinions are found on pages 19 to 36 of the Record.

IV.

ERRORS ASSIGNED.

It is submitted that the Supreme Court erred, First, in holding that, in the exercise of its police power, the State, acting through its Commissioner of Railroads, could require the street railroad company, under the facts and circumstances in this case, to bear one-half of the cost of maintaining and operating the safety devices and appliances, and could make and enforce the order complained of in this case; Second, the State Supreme Court further was in error in not holding that the statutory provision under which the defendant in error assumed jurisdiction and entered the order complained of was in violation of the provision of the Federal Constitution, especially of Section 10, Article 1, of the Constitution of the United States, and that the order deprived the plaintiff in error of its property, franchise and rights without compensation and without due process of law.

Third, in holding and deciding that the statutory provisions in question and the acts of the Railroad Commissioner thereunder were not invalid as denying to the plaintiff in error the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

V.

THE STATUTE OF MICHIGAN, SECTION 5 OF WHICH IS CLAIMED BY THE DEFENDANT IN ERROR TO CONFER THE AUTHORITY UPON HIM TO EXERCISE THE JURISDICTION ASSUMED TO BE EXERCISED AND TO IMPOSE UPON THE PLAINTIFF IN ERROR THE COST OF MAINTAINING AND OPERATING SAFETY APPLIANCES AT THE CROSSING IN QUESTION, IS UNCONSTITUTIONAL AND VOID BECAUSE IT DOES NOT REQUIRE ANY NOTICE TO BE GIVEN TO THE STREET RAILWAY OR TO ANY OF THE INTERESTED PARTIES, OR REQUIRE THE RAILROAD COMMISSIONER TO GIVE NOTICE TO THE PARTIES OR GIVE THEM A HEARING ON THE QUESTION AS TO WHAT SAFE-

TY APPLIANCES SHOULD BE INSTALLED AND MAINTAINED, OR UPON WHOM THE WHOLE OR ANY PORTION OF THE COST OF INSTALLING, MAINTAINING AND OPERATING THE SAME SHOULD BE IMPOSED.

The attention of the Court is invited to the provisions of the statute. It will be noted that the first four sections of the Act provide for the exercise of the authority of the Railroad Commissioner in a class of cases essentially different from the case at bar; that is to say, it specifically provides for the method of procedure and the extent of the jurisdiction and the power of the Railroad Commissioner, with reference to crossings not yet made, but which it is proposed to make, and so far as the rights of crossing steam and street railroads are concerned and the authority of the Railroad Commissioner in regard to same, the statute when passed was purely prospective, and refers to crossings constructed after passage of the Act.

Section 1 of the Act provides that after its passage it will be unlawful for any railroad company to construct its tracks across any street railway or for any street railway company to construct its tracks across the tracks of any railroad company until the place where and the manner in which said crossings shall be made shall have been approved by the Commissioner of Railroads.

Section 2 provides that the railroad or street railroad desiring to make a crossing shall give the company whose tracks are to be crossed a written notice of the place where and the manner in which it desires to make such crossing, and the place where and the time when it will apply to the Railroad Commissioner for approval thereof, which notice shall be served at least ten days before the hearing of the application.

Section 3 provides that in all cases where the Commissioner of Railroads deems it reasonably practicable, crossings shall be made otherwise than at grade, according to plans to be approved by the Commissioner, and when the crossing is to be made at grade the Commissioner shall prescribe safeguards, *which shall be provided by the company desiring to make such crossing.*

Section 4 makes it unlawful for any company to string any wire, electrical or other, over the tracks of any railroad company except in such manner as shall be approved by the Railroad Commissioner, and the company desiring to so string wire shall give the Railroad Commissioner no-

tice in writing of the place where and the manner in which it desires to string the same, and the place where and the time when it will apply to the Commissioner of Railroads for his approval, as above required, which notice shall be served at least ten days before the time of hearing such application.

It will thus be noted that the first four sections provide for the method by which the junior crossing company shall institute proceedings to obtain the right to make a crossing and to invoke the authority and bring into exercise the jurisdiction of the Railroad Commissioner under the Act to determine the nature of the crossing, as to whether it will be a crossing at grade or otherwise, and the nature of the safety appliances to be installed, and specifically requires that the junior or crossing company shall provide such safety appliances. It, in express terms, requires not less than ten days' notice of the place and character of the crossing desired and the time and place where the matter will be submitted to the adjudication of the Railroad Commissioner, but requires that the notice shall come from the moving party, and such notice might be characterized as the institution by the moving party, by proper notice to the senior company, of a quasi judicial proceeding, thus bringing it within due process of law.

The examination of the remaining three sections of the statute shows that they are intended to apply to crossings in existence at the time of the passage of the Act. Section 5 is as follows:

> The Commissioner of Railroads shall, as soon as possible after the passage of this Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; *and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.*

The crossing in question having been made prior to the passage of this Act, this section, if valid, applies thereto, and defendant in error states it to be the authority under which he assumed to act. (Ans. §5, pp. 9-10, Rec.)

Section 6 provides that the Commissioner shall also, as soon as possible after the passage of the Act, either by personal examination or otherwise, obtain information as to all places where the tracks of railroads are crossed by wires strung over said tracks, and wherever in his judgment such wires should be raised to a greater height, or other thing done with reference thereto to guard against accidents, he shall order such change or changes to be made and shall apportion any expense incident thereto between the companies or persons affected as he may deem just and reasonable, provided that wires shall be strung not less than 22 feet above the established grade of the railroad track.

Section 7 of the Act simply contains the penal provisions to be applied in case of the failure or refusal of the company or companies to comply with the order of the Commissioner.

It will thus be seen that two clearly distinct classes of cases are provided for by the Act—first, crossings sought to be made after the passage of the Act, in which the jurisdiction of the Commissioner is exercised only when it is invoked by proper application and proceedings upon the part of the junior or crossing company, the whole duty of giving notice and prosecuting the proceedings to a final determination before the Commissioner resting upon the moving company. No obligation is imposed upon the Commissioner to give any notice to the parties, though the validity of his acts would no doubt depend upon the moving company having complied with the provisions of the statute requiring notice to be given to the senior company. Second, cases where the crossings were in existence at the time of the passage of the Act, and where the investigation is one to be commenced and carried to a conclusion on the motion of the Railroad Commissioner himself. While it is true that the Railroad Commissioner may be induced by the representatives of third persons, as in this case by the municipal authorities of Detroit, to exercise the jurisdiction conferred by Section 5 in the class of cases coming within its scope, yet that does not change the nature of the proceeding or in any way alter the legal significance of the section. The case must be treated as though the proceeding was one in which the Railroad Commissioner on his own motion sought to exercise the jurisdiction conferred by the section. The cases coming within the scope of this section are of a wholly different character from those coming within the provisions of the first four sections of the

Act. Those coming under the first four sections are different not only as to the method pointed out by the statute by which the adjudication may be brought about and imposing upon the crossing and junior company the necessity for invoking the jurisdiction of the Railroad Commissioner, but also in the important particulars that ample notice is required to be given by the moving company, and further in the specific requirement that the safety appliances which the Commissioner determines shall be necessary at the hearing shall be provided by the junior crossing company.

In short, the statute provides in this class of cases for a regularly instituted and prosecuted hearing and an investigation quasi judicial in its character, with all parties interested before the quasi judicial officer who is empowered by the statute to determine the questions involved; whereas, as to the cases coming under Section 5, there is an utter absence of any such requirement. The whole matter is left to the arbitrary action and independent investigation of the Railroad Commissioner, not only on the question of the necessity for the installation of safety devices, but also as to the distribution between the two companies of the cost of installing, maintaining and operating such safety appliances. There is absolutely no provision in the statute, in either class of cases, requiring the Railroad Commissioner to give notice so that there would be no implied requirement that notice should be given in the second class of cases. As further enforcing the view of this section, attention is specifically directed to the provision of Section 6, which applies to cases where wires have been strung prior to the passage of the Act, and in which also there is an utter absence of any requirement of notice.

It is the well settled law that where the public officer is given authority to determine that certain things should be done in the interests of public safety, and if the officer is given the further authority to impose the cost thereof upon certain individuals who are bound by his action, the matter is quasi judicial in its character, and if the law does not in express terms, or by necessary implication arising from the language of the Act itself, grant to the party against whom the judgment is rendered the right to a hearing before condemnation, such a proceeding and judgment amounts to a deprivation of property without due process of law within the meaning of the constitutional provision.

The leading cases in support of this proposition are:

Garvin vs. Daussman, 114 Ind., 429.
Kuntz vs. Sumption, 2 L. R. A. (Ind.), 655.
Stuart vs. Palmer, 74 N. Y., 183.
Ulman vs. Baltimore, 11 L. R. A., 224.
Mayor vs. Scharf, 54 Maryland, 499.
Baltimore vs. Johns Hopkins Hospital, 56 Md., 1.
Spencer vs. Merchant, 125 U. S., 345.
Whitford vs. Probate Judge, 53 Mich., 130.
Paulson vs. City of Portland, 149 U. S., 129.
The Railroad Tax cases. County of San Mateo vs. Southern Pacific R. Co., 13 Fed. Rep., 22. Decision of Justice Field.
The Sonoma county Tax case. San Francisco & N. R. Co. vs. Dinwiddie et al., 13 Fed. Rep., 789.
Burns vs. Multnomach R. C., 15 Fed. Rep., 183.
County of Santa Clara vs. Southern Pacific R. Co., 18 Fed. Rep., 410.
Seifert vs. Brooks, 34 Wis., 443.
State ex rel. Flint vs. Fond du Lac, 42 Wis., 287.

The language of Chief Justice Cooley in Whiteford vs. Probate Judge, supra, is significant. He states:

> "I agree entirely that the proceedings in this case are altogether void. I do not think it legally competent to confer upon the Probate or any other court the power, without notice to the parties concerned, to appoint an officer to decide finally upon the question of laying taxes and to proceed to lay taxes in its discretion, as has been done here, and if the legislation under which this so-called Drain Commissioner has proceeded will permit of such action, it is void."

In that case the court had under consideration a statute authorizing the appointment of a Drain Commissioner with authority to lay out a drain and determine the district upon which the cost should be a charge, which did not provide for notice to the persons owning the property upon which the burden was to be laid.

The case of Seifert vs. Brooks, 34 Wis., 443, strongly sustains our view. In that case it appeared that the statute did not provide for notice in certain proceedings for the opening of a street. It appeared that, in fact, the party complaining had been notified of the time and place for the assembling of the jury, and was present, but took no part in the proceedings. The court held the proceedings void

because of the absence of any provision in the statute requiring the notice in question to be given. In disposing of the question, on page 448, the court says:

> "In Lumsden vs. Milwaukee, supra, where the Act was held unconstitutional because it did not provide that the jury should be sworn before acting, it was likewise decided that the fact that they were actually sworn did not aid their acts or render them any more valid than if they had acted without oath. It is not seen, therefore, how, if the plaintiff had been notified of the time and place of meeting, or if he had been present at such time and place, but taking no part, either circumstance could have availed to cure the defect or render the proceedings of any validity. It is the omission or unconstitutional feature in the statute which vitiates, and that can be cured only by the legislature itself, or, in particular cases, it may be by the waiver or voluntary abandonment of his constitutional rights by the land owner, who has that power."

As noted above, the particular objection was that the statute failed to require notice to be given of the time and place of the assembling of the jury. It will be further noted in this decision that the objection was made by a person whose land was not taken, but whom it was sought to charge with a portion of the expense of opening the street. This case was followed in Wisconsin by a number of others, and notably in State ex rel. Flint vs. City of Fond Du Lac, supra. The court says:

> "But we think the proceedings were fatally defective because the charter makes no provision for giving a proper notice to the owner of the time and place for the appointment and meeting of the jury which determines the necessity of taking his property."

After discussing the matter at some length, the court says, on page 299:

> "It follows from these views that, on account of the failure of the charter to provide for the giving of personal notice to the owner of the property of the time and place of the appointment and meeting of the jury to inquire into and determine the necessity, the proceedings were void, and were properly vacated by the Circuit Court."

In Garvin vs. Daussman, 114 Ind., 429, the Court says:

> "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice."

In Kuntz vs. Sumption, 2 L. R. A., 655, it was held that a statute authorizing a board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation was unconstitutional because there was no provision for notice. The action of the Commissioner is not rendered valid because he supplemented the statute by a notice and hearing which he was not required nor authorized by the statute to give. As was said in the case last cited, "Without a law authorizing notice, there can be none."

"The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to a taxpayer, not as a matter of form, but as a matter of right."

To be sure, this decision was rendered in passing upon a tax regulation; but, as was said in that case, while tax officers are not judicial officers strictly, they exercise functions of a judicial nature.

So the Railroad Commissioner, in apportioning a burden upon railroad companies, exercises functions of a judicial nature. No one will contend that the imposition of the expense of maintaining the devices described in the order in this case, for all time, does not have the effect of appropriating for the public the property of petitioner. This order is in effect a judgment depriving petitioner of a certain amount of its earnings every year.

In Paulson vs. City of Portland, 149 U. S., 29, an assessment for cost of constructing a sewer was attacked on the ground that the city charter did not provide for notice. The court held that notice was provided for, and held:

1. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will.

2. Where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost for the construction of a sewer, the taxpayer has a right to be heard.

3. If provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

And *Mutatis mutandis.*

This is one of the many cases where it has been held that a citizen is entitled to be heard upon the question of what proportion of the expense of a public work established under the police power his property shall bear.

If respondent can make the present order without being required to give a hearing, he can investigate other similar crossings and order the construction of safety appliances and apportion the expense in whatever ratio he may see fit. There is no reason why he may not compel petitioner to pay 90 per cent of the cost, if he can compel it to bear 50 per cent.

We insist that this statute, which attempts to confer upon the respondent the power to impose large and exhausting burdens upon street railroad companies, without any provision for a hearing, is a void provision for depriving persons or corporations of property without due process of law.

The distinction between Paulson vs. Portland and the case at bar appears when it is noted that, as stated by this court,

> "The city is a miniature State, the council is its legislature, the charter is its constitution; and it is enough if in that the power is granted in general terms, for, when granted, it must necessarily be exercised, subject to all limitations imposed by the constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

Usually the grant of power to municipalities in this country to provide for the opening of streets, construction of sewers and drains and to tax the cost thereof upon property benefited, is general in its character, leaving to the legislative action of the Common Council the determination of the methods by which the power so conferred in general terms shall be exercised, but the Common Council

must, in the exercise of its power, make some provision or regulation by which notice shall be given to the property owner affected, and in the absence of such regulation or provision the proceeding would be invalid. The case at bar, however, is not one in which the grant of authority is of the same character. Here we have a case where there is a naked grant of power to an officer having no legislative authority under which he is empowered to investigate in any manner he may see fit the subject matter covered by the legislation, and which is couched in such language as precludes the idea of an inquiry and hearing on notice. The language of the statute is:

> "The Commissioner of Railroads shall examine the crossings of the tracks of railroads and street railways then existing, and order such changes made in the manner of such crossings, for such safeguards for protection against accident, as in his judgment ought to be so made or provided, and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

There is no provision in this or in any other statute authorizing the Commissioner to prescribe rules and regulations and to settle on a course of procedure to be followed under this section.

V.

The Legislature has not the power under the constitution to authorize the Railroad Commissioner to impose the cost of maintaining and operating safety devices and appliances upon the street railway company under the facts and circumstances in this case, for the reason:

1st, that it, in terms, imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street and to operate its cars thereon;

2d, it violates the settled principle of constitutional law (in Michigan) under which the steam railway company, being the junior company making the crossing of the highway, of which the street railway is but a part, and which in fact, by such crossing, causes the danger which creates the necessity for the installation and maintenance and operation of safety devices, chargeable with the cost of such maintenance. The

Act, in terms, seeks to confer upon the Railroad Commissioner the general authority to place the burden of maintaining and operating safety devices upon one or both of the companies in such proportion as may to him seem just, yet such authority is qualified by and must be exercised in conformity with the settled principles of constitutional law, and which fix and determine the respective rights of the parties.

3d, the attempt to fix upon the street railway company, which is simply a user of the highway in common with the general public, the cost of installing, maintaining and operating devices intended for the protection of the whole public using the highway, is an unjust discrimination, and is a denial of the equal protection of the law to the street railway company.

In the outset, it must be noted that the companies, the steam railroad company, which is the junior company and whose crossing created the danger, and the street railway company, stand in wholly different relations so far as their rights are concerned, to the public. The steam railroad track and right of way is private property, along which the general public, either on foot, on horseback or in vehicles of their own, have no right to travel; whereas, the street railway track rests upon the public highway, and, while its rails may be private property, they are private property subject to certain public uses, and no matter what part of the highway they may be supposed to occupy, such occupation is not and cannot be exclusive. The street railway track remains a part of the public highway along which the public have a right to travel, and the street railway occupation is subject to the paramount right of the general public to use all parts of the highway. If there were no street railway track in the street at all, there would still be the general public using it, and the danger to the general public and the duty to provide against injury to the general public remain precisely the same. It is a matter of common knowledge, of which the Court will take judicial notice, that on the streets of cities immense truck loads of heavy material are constantly being hauled, and in these modern days heavy motor wagons and trucks and carriages for the transportation of persons and property are being constantly operated. So I say that in this respect the distinction between the two companies is so marked that it affects the entire question involved.

The gist and force of the distinction which we are seeking to make is this, that the steam railroad track and

right of way being wholly private property and being wholly devoted to the operation of steam cars on tracks and not devoted to the general public use, and the railroad company being the sole occupant and user thereof, there cannot arise on the reasons stated, any objection to the railroad company being subjected to the expense of maintaining the safety devices, upon the ground that it is denied the equal protection of the laws, whereas, as to the street railway company, it is one of the innumerable users of the common public highway, all of whom it is intended shall be protected from the dangers of the railroad crossing by the installation and maintenance of safety devices, and it is sought to select it out from among the numerous users of the highway upon whom to place the whole burden of maintaining the safety devices designed for the protection of all the innumerable users, against a danger not created by it, thus denying it the equal protection of the laws.

It is also a matter of common knowledge of which the Court will take notice that the gates and safety appliances that are constructed at the intersection of highway and steam railroads are placed not upon the railroad right of way for the purpose of checking and controlling the operation of trains upon the railroad, but are placed upon the highway to prevent the passage of vehicles and others traveling on the highway across the railroad track when trains are approaching or about to pass. No attempt is made to interfere with or interrupt the passage of trains. No attempt is made to require them to stop. This may be accounted for in two ways: 1st, that it would be an unreasonable regulation to require the stopping of heavy railroad trains on street crossings even where street car tracks are laid and operated on the street, and 2d, the real danger existing at these crossings, is the danger to the public traveling upon the highway, no matter what the form of conveyance or method of travel may be. Any danger arising to the railroad train because of pedestrians or ordinary vehicles or even the ordinary street car getting upon the track is a negligable quantity. A thousand persons might pass along the highway as free from danger as one person might were there no railroad track and no railroad trains rushed across the highway at a high rate of speed. In short, the practical application of any provision for the installation of safety devices at crossings of railroad tracks and highways operates as between users of the highway and users of the railroad to the distinct advantage and benefit of the railroad com-

pany, so far as any interference with any operation of the railroad is concerned. The safety devices are intended to prevent the public from getting upon the railroad track. The trains are not stopped to permit the public to pass freely, and we may concede that it is entirely reasonable and proper that such should be the proper application and result of such regulations and the installation of safety devices. But, on the other hand, it enforces the proposition that the real danger sought to be avoided is one which arises from the construction and operation of a railroad across the highway. Bearing these considerations in mind, we come to the discussion of the questions of well settled rules of law which, in our opinion, apply to this controversy.)

VI.

The discussion of what we have to say on this branch of the case will be in support of the application to it of well settled principles of law recognized by the Supreme Court of Michigan, and generally accepted by the courts throughout the country. They are as follows:

(1) "That the permission of the street railway company to lay its tracks in the street already appropriated to public use is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such road is clearly a mode of facilitating existing travel and of modifying or changing the existing public use." It is simply adding an additional mode of conveyance to those already in the street. The interest of a street railway company in the street upon which its tracks are laid is a part of the public easement in the streets accessory and appertinent to the existing right of the public in passing over the street. It obtains no right to any part of the street to the exclusion of the general public.

(2) "The railroad company which has acquired a permanent easement in the street crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the propelling of street cars is only a form of the exercise by the public of such right of passage and does not operate as

an infringement upon such easement." The street car carries along the street such passengers as would otherwise be obliged to pass over it on foot or by other conveyance. A steam railroad as ordinarily operated adds another servitude to the street because it prevents the use of the streets in the usual modes and interferes and embarrasses the usual modes of travel; whereas, the ordinary street railway furthers the original use of the street by relieving the pressure of local travel. The rights of the steam road to the crossing are and always have been subject to the public easement in the streets, subject to the right of public passage over the same. The propelling of street cars is only a form of the exercise by the public of its right of passage.

(3) Another well settled principle in Michigan is that a steam railroad in constructing its tracks across an existing highway must pay all the expenses of putting the highway in a safe condition and erecting and maintaining such safeguards as are required for the protection of travelers upon the street or highway as well as those who are traveling upon the steam cars. The correlative proposition is also well established, namely: When a public highway is laid out across an existing railroad, the public must compensate the railroad company, not only for the value of the land taken, but also for the construction of requisite safeguards, including gates, flagmen, fences, cattleguards, etc., for the protection of the public. The theory upon which this last doctrine is declared, as to the danger or as to the company or track which caused the danger or creates the conditions resulting in the danger to the public, it alone can be required under constitutional provision to be at the cost of reducing the danger to a minimum and of protecting the public, so far as it can be done, from damage.

We desire to emphasize the distinction elsewhere pointed out between the determination of the necessity for the safety devices at the crossing, and the determination of the person or corporation who should bear the expense incident to their construction and maintenance. The *necessity* for these precautions, the decision that the public safety requires them, is a matter which the Lgeislature has properly left to the Railroad Commissioner. His discretion is the sole test and measure; and ordinarily, in the absence of its abuse, its exercise is not a matter of inquiry. Neither is any person entitled to a hearing upon such a question.

But otherwise, when the Commissioner undertakes to distribute the burden of expense. As soon as he enters upon this branch of his delegated authority, his duties become judicial or quasi-judicial in character. His acts are no longer *discretionary*. Even the statute requires the apportionment of the burden to be just and equitable, and even in the absence of such requirement, he is as much bound by the rules of law as would be a court of justice were the question presented in a condemnation proceeding. If a court of law could not compel the older road to pay for making a crossing safe in a condemnation proceeding, will it be contended that a commissioner appointed by the Legislature could?

The necessity for these devices is a matter which the Legislature may decide upon; but who shall pay for them is a matter which can be decided only in accordance with established principles of law, among which is that whenever a person's property rather than another's is taken or burdened, for the public welfare, it must be either because he is benefited by the improvement, or because he renders the improvement necessary. In the absence of both of these conditions, property cannot be taken without compensation. These principles are universal in their application and control the Railroad Commissioner as well as any other officer, body ~~of~~ or person.

VII.

"According to a fundamental principle of law, the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom."

Am. & Eng. Enc. of Law, Vol. 8, page 351.

This is the rule recognized generally, and enforced in Michigan, and is based upon the fact that until the intersecting road is built there is no danger. In accordance with this rule, it is generally held that where one railroad intersects another the former must make compensation; and likewise where a railroad is built over a highway, or where a highway is built over a railroad. This doctrine, thus generally recognized as applied to the facts of the case at bar, must mean that the Union Terminal Association should bear the expense of rendering Clark Avenue safe at the point where its tracks form the crossing. This would unquestionably be so in case the steam road were to condemn a right of way across a public street—under the repeated decisions of

the Michigan Supreme Court. These decisions recognize clearly the principle that the road making the crossing is responsible for the danger, and therefore must bear the expense of averting it. The same rule applies where a highway is opened across a railroad.

The following is quoted from an opinion by Mr. Justice Brewer (166 U. S.):

"The question was presented to the Supreme Court of Kansas in Kansas C. R. Co. vs. Jackson County Comrs., 45 Kan., 716, 724, where a highway was sought to be established across a railroad track, without any compensation, and the court denied the claim, saying: 'Whether the duty imposed upon the railroad company of constructing cattle guards, fecnes, signs, etc., can be or is imposed upon it under the police power of the State, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary for any of these things to exist; but if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. Smith County Comrs. vs. Labore, 37 Kan., 480, 484, et seq.' See also the many cases cited in the opinion. Among them is Grand Rapids vs. Grand Rapids & I. R. Co., 58 Mich., 641, 648, in which it was said by Campbell, Ch. J.: 'The damage done to a railroad by having a highway run across it must necessarily include all the additional expenses entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe, and providing guards against accidents.' Again, in Chicago & G. T. R. Co. vs. Hough, 61 Mich., 507, 508, the Court observed, speaking by the same chief justice: 'If a railroad interferes with an existing highway, it must bear all the expense of crossing and restoring the highway as far as practicable to safe condition, and the fencing and cattle guards are necessary for that purpose. But, as pointed out in People vs. Lake Shore & M. S. R. Co., 52 Mich., 277, when a new highway is created, then it belongs to those who create it, to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions.'"

In the case of the Illinois Central Railroad Co. vs. the City of Bloomington, 76 Ill., 447, after a railroad was built, a certain street was opened and made across it, the city by ordinance requiring the railroad company to make a proper and safe crossing by grading the approaches of the street at the crossing. The Court used the following language:

"Suppose a natural person had the right of way across his neighbor's grounds, and afterwards the city were to locate and open a street across his highway, does any one suppose the owner of the right of way could be compelled by legislative enactment, or an ordinance in pursuance thereof, to construct the crossing of the street at his own expense, *even if his use of the right of way should render the use of the street impracticable or dangerous until the approaches should be constructed?* We presume no one would contend for the power in that case. And why? Because it would impose an unequal and unjust public burden on the owner of the right of way, that in spirit would be the taking of private property for public use without just compensation, which is prohibited under the Constitution."

VIII.

So far we have endeavored to show that what may be called the doctrine of *priority of location*, is well recognized in Michigan and other jurisdictions. According to this doctrine the railroad is responsible for the danger at the crossing at Clark Avenue, because before it was constructed there was no crossing and consequently no danger there. It remains, then, for the steam railroad to bear the expense of making the crossing safe. It is a lame argument to say that because there may have been no necessity for these devices when its first track was built across the street it could not have been compelled in a condemnation suit to pay for devices which might become necessary in the future. The truth is, if no devices were needed while the Wabash company maintained a single track over the highway, and while the traffic was small, this should constitute no immunity from the obligation to protect the public from risk of injury by the 38 passenger trains which at present rush over this street without stopping—to say nothing of the freight traffic as well. If it is true that one track can be built over a highway and be excused from making compensation for safety devices on the ground that they are not necessary because of the smallness of the traffic on that one track,

and then turn about and increase the track and sell or lease to an association which permits four or five railroads to run their trains over such crossing, with the result that safety devices become necessary, and saddle the expense upon the public owning the highway, or worse still, upon one user of the highway, we think that the door is opened for gross inequality and fraud. We do not believe that such is a rule which this Court will enforce or recognize.

On the contrary, we not only contend that the new Terminal Association should bear this burden because its right to cross was obtained after petitioner's tracks were in the street, but we rest our argument on the broad ground of the *nature of the use* which these two corporations make of the highway at this point.

We contend that a street railway which has been granted a franchise to occupy a public street, acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all. The authority for this view is found in the following cases, and although the facts to which the principles involved were applied differed from those of the case at bar, the principles themselves are involved here and must, in our opinion, control.

In Railroad vs. Street Railroad Co., 139 Ind., ..., 26 L. R. A., 337, it was held that a street railroad could be built in a highway, over the tracks of a railroad which had been built across the highway, without any compensation to such railroad. The Court said as follows: "The overwhelming weight of authority seems to settle the law * * * that a street railway is not an additional burden to that of the general easement in the street" (citing numerous cases); "the use of the street by appellant (the steam railroad) is subject to the easement of the public; and the burden of keeping the street crossing over its track in such a condition as not to impede or obstruct the public easement and use of the street by the public generally, is a burden already resting upon the appellant (that is, before the street railway was built). That burden is in no way added to or increased by the crossings appellee (street railway) proposes to construct. So long, therefore, as it is the settled law of this

State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held the right of such street railway to cross over the tracks of a steam railway laid on such street *is subject to no conditions other than those to which the general public is subject* in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossing as passable for the general public as they were before the construction of their tracks thereon, * * * having obtained its right of way subject to the burden of the easement in the public generally, *and the street railway being entitled to the use of that easement,* all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street."

In C., B. & Q. Ry. Co. vs. West Chicago Street Railway Co., 156 Ill., 225, 29 L. R. A., 485, a similar set of facts were presented. It was said there "that the permission to a street railway company to lay its tracks in a street already appropriated to public use, is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such a road is merely a mode of facilitating existing travel, and of modifying or changing the existing public use, adding an additonal mode of conveyance to those already upon the street. The interest of a street railway company in the street upon which its tracks are laid * * * is part of the public easement in the streets accessory and appurtenant to the existing right of the public in passing over the street." "A railroad company which * * * has acquired a permanent easement in the streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street, under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the *propelling of street cars is only a form of the exercise by the public of such right of passage,* and does not operate as an infringement upon such easement."

The Court further said: "A city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of a street. It will not be denied that pedestrians, and carriages and wagons and omnibuses have a right to pass along these streets over and across the tracks of the plaintiffs in error; a *street car* running upon rails,

laid upon the surface of the street, and used in the ordinary way, under the regulations of the city authorities, *is merely another sort of carriage*. The use of a street for horse railway is such a use as follows within the purposes for which streets are dedicated and acquired by dedication. 2 Dill Mun. Corp., 4th Ed., Sec. 722."

The Court further said "the street car carries along the street such passengers as would otherwise be obliged to pass over it on foot. * * * A steam railroad, as ordinarily operated, adds another servitude to the street, because it prevents the use of the street in the usual modes, and interferes and embarrasses the usual modes of travel; whereas the ordinary street railway furthers the original use of the street by relieving the pressure of local travel." (Citing cases.)

Speaking of the steam road, the Court said: "Its rights to the crossing are, and always have been, subject to the public easement in the streets, and subject to the right of public passage over the same. The propelling of street cars was only a form of the exercise by the public of its right of passage."

In a note in Vol. 29, L. R. A., 486, similar cases, discussing and applying these principles, are collated.

The foregoing cases, it will be observed, arose from an attempt by steam railroads to require street railroads wishing to intersect them to pay damages. "A similar question," says the writer of the editor in the note referred to (29 L. R. A., 486), "arises when a street railroad has been first built, and a railroad company seeks to acquire a crossing." All the cases recognize that a street railroad, from its franchise, acquires the right to use the street in common with others, and that a railroad company built afterwards must do all things necessary to render the highway safe and practicable for the lawful purposes for which it was opened, including, of course, street railroad purposes. If this is so, we insist that Wabash Railroad Company could not be authorized to build its steam road over Clark Avenue sixteen years after petitioner's tracks were in the street and petitioner by a statute passed after it was incorporated, be compelled to bear the expense of rendering the highway safe from a danger caused by, or due to the unusual use made of it by the Union Terminal Association. The street railway has a right to be in the street, and is entitled to use the public easement therein on an equal footing with anybody else. If it increases the danger of travel on the highway, it may be compelled to bear the expense of protecting the public from the danger caused by it. If, however, a railroad is afterwards constructed across the highway and danger

thereby arises to those who travel along the street, there could be no justification for compelling a street railway company to bear the expense of protecting the public easement from danger arising from such a source. It is no answer to say that the presence of the street railway tracks on Clark Avenue renders the crossing more dangerous. *A steam road acquires the right to cross in view of all possible, lawful uses which the street may be put to*, and if its presence there heightens the danger incident to the lawful use of the street, it alone can be regarded as the author of that danger, and should be compelled to bear the expense of averting it. As was said in New York, N. H. & H. Railroad vs. Bridgeport Traction Co., 65 Conn., page 410, where the street railway was put across an existing railroad, "the street railroad not so much *causes* as *increases* a danger." The danger which it increases is the danger caused by the steam road built across the highway, and but for the danger thus caused, the street railway would find no danger to increase. Besides this, such danger as is caused by the steam railroad, and increased by any lawful use of the highway, is a danger which the steam road is bound to foresee and provide against.

Where a railroad is built over a highway it runs the risk of being obliged to incur some expense in rendering the crossing thus made safe, and it may be required to pay for such devices as are necessary to bring about this result, reference being had to all possible lawful uses to which the highway may be put. It has been held accordingly that where a railroad is built across an existing highway, and afterwards a street railroad is laid in the street, no compensation need be made by the street railway, on the ground that the easement which the railroad acquired with the public highway was subject to a full enjoyment of the public easement, in and along the highway, in the enjoyment of which the street railway was entitled to participate.

In N. Y. & H. Railroad Co. vs. Bridgeport Traction Co., 65 Conn., page 410, this situation arose, and the Court held as we have indicated. The reason assigned was because "The steam road took the risk of suffering such an inconvenience or peril when it elected to build its road over Fairfield Avenue at grade. It (the street railway) was no more bound to porvide for compensation to the plaintiff railroad for the injury it may suffer than to provide for it in favor of any individual who may have occasion to cross the defendant's tracks at the hazzard of a possible collision with is cars."

The cases of this sort are collected in C., B. & Q. Ry. Co. vs. Steel, 47 Neb., 741, where the same doctrine was laid

down. In Railroad Co. vs. Buffalo R. & P. Railroad Co., 149 Pa. St., 1, the court approved of an opinion by the Common Pleas Judge, from which we quote the following: "The crossing of its track by the passenger (street) railway company gives no greater right to damages in the view we take of the case than it would be if the claim was made against an omnibus line."

It will, of course, be said that if the street railway tracks were not in the street, the derailing devices would not be necessary, and it is equally true that if there was no steam road built there, none of the devices would be necessary. We submit it is not sound to say that if the street railroad were not in the street there would be no crossing, and therefore no danger. If the street railroad were not there, there would be more frequent passing by pedestrians and persons in private conveyances, and the danger might be even greater in point of fact. It is sound to say, however, if the steam road which has an unusual use of the street had not been afterwards built across it, there would be no danger. The danger which is to be averted, then, is a danger directly caused by the steam railroad which is given the right to use the public easement, thus imposing an additional servitude upon the street and rendering the proper and usual modes of use of the highway hazardous. It might be said that if there was no omnibus line using the highway, there would not be so much danger of accident by a steam railroad which crossed it. The answer to this is that the use of the highway by an omnibus line as also by street railway is one of the lawful, ordinary uses of the highway, and if the presence of the railroad causes a danger to arise from the ordinary, lawful use of the public easement, then the steam road, and it alone, can properly be said to be responsible for that danger. If the danger thus caused by the steam road is heightened because the public easement is used in one manner rather than in another, so long as both methods are usual and lawful uses of the highway, that imposes a burden upon the corporation which causes the danger, and not the one which heightens it.

The decisions of the court of Michigan are in harmony with those already cited.

"It was held in Detroit City Ry. vs. Mills, 85 Mich., 634, that an ordinary street railway is not an additional burden or servitude, * * * and there is almost a consensus of judicial opinion in this direction."

Nichols vs. Railway Co., 87 Mich., p. 369.

Mr. Justice Cooley, in Grand Rapids vs. Heisel, 38 Mich., 62, said: "A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is enough that the use of the street for a city railway is a proper use, and therefore a lawful use."

Speaking further, he said:

"But we cannot say the same in the case of the ordinary railroad." The rule is well settled in this State that the dedication of a street to the public does not authorize it to be so used for an ordinary railroad track."

In Detroit City Ry. vs. Mills, 85 Mich., p. 654, Justice Grant said, speaking of the use made of the street by a street railway:

"They constitute a modern and improved use only of the street as a public way. These improved methods become necessary in populous cities."

In conclusion we desire to say that we do not think a better statement of our view of the law of this branch of the case can be found than that contained in the opinion of Justice Grant on pages 34, 35, 36, 37 of the record. On page 34 he says: "Since writing the above I have received the opinion of my brother Moore. The question involved is of such great importance that I feel justified in making a brief reply." He then proceeds to state:

"It is well to keep in mind the precise question for our determination. The question is not between two steam railroads crossing each other on private grounds or on the public highway. Neither is it between steam railroads and the entire public using the highway. It is between steam railroads and one user of the public highway,—and the question is who shall pay for the protection of the entire public? or, in other words, can one user of the public highway be required to pay part or all the expense of protecting all users of the highway, and as well those traveling upon the steam road? It must also be borne in mind that no one is seeking to abridge, lessen or destroy the police power of the State to adopt any and all regulations which are necessary to protect the persons and property of those using the highway or the steam road. This power remains the same. The State, either directly or through the municipality, can regulate the speed of street cars within 100, 500 or a 1,000 feet of the crossing. It can compel them to stop at any distance

from the crossing. It can regulate the speed of the steam car when approaching. It can, as it now does, compel an employee on the street car to advance to the track before crossing and see whether the crossing is safe. It may compel the steam road to erect gates, etc.

I again quote from Chicago, etc., R. Co. vs. Whiting, etc.:

"So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway's company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of the steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossings as passable for the general public as they were before the construction of their tracks thereon."

The logic of this case and others cited by me upon the same point is, that the street railway is a proper, legitimate and necessary use of the public highway, and that it cannot be made subject to conditions "other than those to which the general public is subject in traveling over the streets." Wherein is the logic of compelling one user of the public highway to pay the whole or part of the expense in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam cars? It is not the street car which causes the congestion of travel at this point; on the other hand, it relieves the congestion. The congestion is caused by the increase of population,—by vehicles of all sorts, engaged in the transportation of goods and passengers, and as well travelers on foot.

My brother refers to the horseless carriage as probably increasing the danger to those who have the right to travel in the streets. Will it be contended that the owners of horseless carriages could be selected from the owners of other vehicles using the highway and compelled to in part or entirely pay for the expense of gates, etc., at a railroad crossing?

If a cartage company, a corporation, were engaged in the transportation of goods with its heavy trucks and

enormous loads over this highway every fifteen minutes or half hour in the day, could it be compelled to pay part or all of the expense to avoid the danger caused by the trains of the steam roads? Many vehicles with their loads are as heavy, and sometimes nearly or quite as large, as ordinary street cars. The tally-hoes, with four or six horses, are certainly as dangerous at these crossings as are the street cars. But for the street cars there would be more conveyances of other character, and more congestion of travel at these crossings; and consequently more danger than results from the use of the street cars.

It is urged that the facts in the cases I have cited are not those of this case, and that the precise question now before us was not involved in them. This is true. The same may be said of the cases cited in my brother's opinion, unless it be the Maine case, to which I will refer hereafter. The question is a new one, and calls for the application of principles to be deduced, so far as possible, from the decided cases, and by the application of sound legal principles.

My brother says:

"If there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner." Citing several cases.

Will it be said that if there were no electric cars there would be no necessity of interference by the commissioner or some other authorized body to protect the public and prevent danger? Is the electric car the sole cause of the danger so far as it is caused by the using of the highway? Might not the danger be as great, or even greater, without the street car? The cases cited by my brother relate to fences, cattle-guards, farm crossings, and the like, and do not touch this case. The statement of my brother that "under the exercise of the police power in the interest of public safety, the State is auhorized to interfere," is the conceded law. But does that affect the question who shall pay for these safeguards?

The authorities cited, apportioning the expense where one steam road crosses another, are not, in my judgment, applicable. He quotes extensively from Railroad Company vs. Railroad Company, 30 Ohio St., 604. I under-

POINTS FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

I.

Since the preparation of the brief of the plaintiff in error in this case, we have been served with a motion in behalf of the defendant in error, for a dismissal of the writ of error or affirmance of judgment. Two points are sought to be made by the motion, 1st, that there was no Federal question raised in the case or passed upon in the court below, and 2d, if Federal questions were raised and necessarily passed upon in the court below they have been so frequently passed upon by this court, adversely to the position taken by the plaintiff in error, that they have become settled law and no longer open to argument. The motion in terms follows the language of the rule that the writ of error is evidently issued for the purpose of delay and the questions raised are frivolous and without merit.

II.

A reference to the petition will disclose that the first ground of the motion above stated, i. e., no Federal questions were raised in the case, is utterly without foundation. The petition is contained on pages 11, 12, 13, 14, 15, 16 and 17 of the record. After stating the facts in the case, among others, stating the provisions of law under which the commissioner claimed authority to make the order in question, paragraph 12 of the petition (pp. 16 and 17) states as follows:

> "Your petitioner represents that it is advised that the said order of the Railroad Commissioner is wholly without authority of law and is void and without force; and charges that unless it is so declared by this court, your petitioner will be subject to a penalty of ten dollars ($10) a day until said order is complied with. That the enforcement of this order is unjust and oppressive and that unless its enforcement is prevented by this court, your

petitioner will be deprived of its property, franchises and rights without due process of law, and in contravention of section 10, article 1, of the Constitution of the United States, and of a like provision of the Constitution of the State of Michigan, and will also be denied the equal protection of the laws in contravention of section 1 of the fourteenth amendment of the Constitution of the United States."

The section further goes on to state that your petitioner is without remedy, except save in the manner sought, that is to say, through a writ of mandamus, requiring the Railroad Commissioner to vacate the order in question. The truth, as shown by this record, is that the only points raised were those coming within the questions raised in paragraph 12, to-wit, lack of due process of law, and the taking of the property of the plaintiff in error and without compensation and the denial to it of the equal protection of the laws by the making and enforcement of the order. In this branch of the motion, it remains to be seen whether these points were argued to the Supreme Court of the state and the rights claimed under the constitutional provisions named, necessarily denied to the plaintiff in error by that court.

It would seem as though counsel for the defendant in error had either not read the opinions of the judges of the State Supreme Court or had read them so carelessly that he did not understand the point on which that court divided. The two opinions will be found in the record; that of three of the judges, a bare majority, on pages 19 to 29, that of the minority, on pages 30 to 37. That the question that the State Supreme Court discussed in the opinions, seemed to them to be one of considerable difficulty and great importance and seriousness, is sufficiently shown by the fullness and elaborateness of the opinions and the evident earnestness with which they were written.

The question upon which they divided was the one under the fourteenth amendment raised by the plaintiff in error, to-wit, that in the making of the order, it was denied the equal protection of the laws, the exact point being that the street railroad company was simply one of the innumerable users of the public highway, all of whom stood, so far as the use of the highway was concerned and so far as their right to use the highway was concerned, in a public sense, upon an equal footing, and

that to select one of the users of the highway and to place upon that user, the burden of maintaining gates in the highway at the railroad crossing, and the expense of maintaining and operating the gates for the protection of the whole public, was an unlawful discrimination and a denial to it of the equal protection of the laws.

It is the well settled law of Michigan and we believe it is the well settled law of every state of the union that a street railway is not an additional burden upon the easement, but is in direct accordance with the purposes for which the highway was established and that the company has not exclusive rights in any part of the highway, but its use thereof is subject to the paramount right of the general public to travel thereon.

III.

The cases cited in the opinion of Justice Grant and which the majority of the court declared were distinguishable from the one under consideration, were quite numerous, and are fully referred to and quoted from by the learned justice and in the brief for plaintiff in error on the merits.

In looking at the opinion of Judge Grant on page 34, it will be seen that his opinion was evidently intended to be, when written the opinion of the court. After fully discussing the question of discrimination and holding that the street railway company was a lawful user of the highway and as such user could not be selected to pay the whole or any part of the expenses for the protection of all who travel upon the highway or upon the railroad, states,

> "This disposal of the case renders it unnecessary to determine the other questions raised."

He then continues:

> "Since writing the above, I have received the opinion of my brother, Moore. The question involved is of such great importance that I feel justified in making a brief reply."

The opinion then proceeds to discuss and consider the views of the opinion of Judge Moore which was finally adopted as the opinion of the majority.

This court has frequently stated that it was not necessary that the lower court should quote the constitutional

provision or in direct language state that the question passed on was a question under the Federal constitution. It is enough if the question is raised by the pleadings and the point necessarily passed on when reaching a conclusion adversely to the party asserting the constitutional right.

IV.

The other Federal question raised by the petition and the denial of the constitutional right which the plaintiff in error asserted, resulting from the order of the Railroad Commissioner, was that the order of the Railroad Commissioner was not due process of law. This point was very fully presented in the brief and oral argument. The exact point was that the authority of the Railroad Commissioner to make the order in question was conferred solely by section 5 of the statute quoted in the main brief. The answer of the Railroad Commissioner found on pages 9 to 11 of the Record and in paragraph 5, he quotes section 5 of the Act, and asserts that it conferred upon him the authority and duty to make the order which this proceeding is instituted to vacate and set aside. The section confers plenary power upon the Commissioner to make and requires him to exercise that power. It does not require or make any provision for any notice to the parties or any hearing of a legal character or of any character to the parties. It is utterly silent in that regard. It has reference solely to crossings in existence at the time of the passage of the whole act, in which it is included. All of the other provisions of the act have reference to the making of crossings after the passage of the act and confer upon the Railroad Commissioner certain powers and jurisdiction with reference to such future crossings and fixes the method and the practice by which the jurisdiction of the Railroad Commissioner is invoked. They have no reference whatever to the exercise of the jurisdiction of the Railroad Commissioner over crossings that were already established when the act was passed, and their provisions are apt and clear in not only defining the cases where the jurisdiction may be exercised and the method by which it will be invoked, but also in express terms declares upon whom the burden of maintaining the safety appliances shall be placed, i. e., upon the junior company.

The plaintiff in error therefore claimed that as the section of the act which the Railroad Commissioner admits was the one creating the jurisdiction which he attempted to exercise, omitted to provide for any notice to the parties in interest, or for a hearing before he should impose upon them the burden and expense of installing and maintaining the safety devices, it was void and his action thereunder was a determination of the rights of the parties without due process of law. This objection to the act, if held good, necessarily determined that the order of the Railroad Commissioner was absolutely void and the order could not be sustained, as it was, by a majority of the State Supreme Court without overruling this objection.

It does not seem to us necessary in the brief on the motion to cite the cases showing the serious character of this point. They are fully discussed in the brief on the merits, and are also contained in the quotations from the briefs filed for the plaintiff in error in the Supreme Court of the state. Why the court below did not consider the point in the opinions filed, does not appear but it is quite evident that it was overlooked. We print herewith those portions of the briefs of plaintiff in error in the Supreme Court of the state touching this question. The main brief filed by petitioner contains the following discussion:

> "The act in question is unconstitutional and void in our opinion, for the reason that it makes no provision for notice, and gives no opportunity for a hearing to the corporations interested. It, in fact, lacks all the necessary characteristics of a valid statute under which property may be taken from one person and given to another, or by whose authority the property of either may be appropriated to public service or use.
>
> "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice."
>
> Garvin vs. Daussman, 114 Ind., 429.

In Kuntz vs. Sumption, 2 L. R. A., 655, it was held that a statute authorizing a board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation, was

unconstitutional because there was no provision for notice. The action of the Commissioner is not rendered valid because he supplemented the statute by a notice and hearing which he was not required nor authorized by the statute to give. As was said in the case last cited: "Without a law authorizing notice there can be none."

"The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to a taxpayer not as a matter of form, but as a matter of right."

To be sure, this decision was rendered in passing upon a tax regulation; but as was said in that case, while tax officers are not judicial officers strictly, they exercise functions of a judicial nature.

So the Railroad Commissioner in apportioning a burden upon railroad companies exercises functions of a judicial nature. No one will contend that the imposition of the expense of maintaining the devices described in the order in this case, for all time, does not have the effect of appropriating for the public the property of petitioner. This order is in effect a judgment depriving petitioner of a certain amount of its earnings every year.

In Paulsen vs. City of Portland, 149 U. S., 29, an assessment for cost of constructing a sewer was attacked on the ground that the city charter did not provide for notice. The Court held that notice was provided for, and held:

1. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will.

2. Where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost for the construction of a sewer, the taxpayer has a right to be heard.

3. If provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

And *mutatis mutandis.*

This is one of the many cases where it has been held that a citizen is entitled to be heard upon the question of what proportion of the expense of a public work established under the police power, his property shall bear.

If respondent can make the present order without being required to give a hearing, he can investigate other similar crossings and order the construction of safety appliances and apportion the expense in whatever ratio he may see fit. There is no reason why he may not compel petitioner to pay 90 per cent of the cost, if he can compel it to bear 50 per cent.

We desire to emphasize the distinction elsewhere pointed out between the determination of the necessity for the safety-devices at the crossing, and the determination of the person or corporation who should bear the expense incident to their construction and maintenance. The *necessity* for these precautions, the decision that the public safety requires them, is a matter which the legislature has properly left to the Railroad Commissioner. His discretion is the sole test and measure; and ordinarily in the absence of its abuse, its exercise is not a matter of inquiry. Neither is any person entitled to a hearing upon such a question.

But otherwise, when the Commissioner undertakes to distribute the burden of expense. As soon as he enters upon this branch of his delegated authority his duties become judicial or quasi-judicial in character. His acts are no longer *discretionary.* Even the statute requires the apportionment of the burden to be just and equitable, and even in the absence of such requirement, he is as much bound by the rules of law as would be a court of justice were the question presented in a condemnation proceedings. If a court of law could not compel the older road to pay for making a crossing safe in a condemnation proceeding, will it be contended that a commissioner appointed by the legislature court?

The necessity for these devices is a matter which the legislature may decide upon; but who shall pay for them is a matter which can be decided only in accordance with established principles of

law, among which is that whenever a person's property rather than another's is taken or burdened for the public welfare, it must be either because he is benefited by the improvement, or because he renders the improvement necessary. In the absence of both of these conditions, property cannot be taken without compensation. These principles are universal in their application and control the Railroad Commissioner as well as any other officer, body or person.

We insist that this statute which attempts to confer upon the respondent the power to impose large and exhausting burdens upon street railroad companies, without any provision for a hearing, is a void provision for depriving persons or corporations of property without due process of law.

We contend that Act 171, Public Acts of 1893 and the order of respondent are void for the reason that they deprive relator of its property without due process of law and without just compensation, and deny relator the equal protection of the law, in violation of article V., and Section 1 of Article XIV. of the amendments to the Constitution of the United States; and of Section 32 of Article VI. and Section 14 of Article XVIII. of the Constitution of the State of Michigan.

In the reply brief the matter was treated at considerable length. After analyzing the statute at length, it proceeds to say:

"The statute treats the crossings in two classes:
A. Future crossings.
B. Existing crossings.

As to class A, the jurisdiction of the officer is invoked by the application of the junior company for the approval of crossing plan by the Railroad Commissioner, on due notice to senior company. Upon such application the jurisdiction of the Commissioner is limited to the approval of the plans and necessary safeguards. The cost of the safeguards are by the statute made a charge against the junior company.

As to class B (Existing crossings), the jurisdiction attempted to be given the officer is broader and more plenary. Its exercise is required by the

terms of the statute. It is visitorial and inquisitorial, and is the police power put in aggressive action by the state for the purpose of affecting existing lawful conditions. As to this class the quasi-judicial power is given the office to divide the cost of installing and maintaining such safety devices as he may order between the companies in such proportion as he may deem just and reasonable, and the language of the act excludes the idea of requiring notice.

It will also be noted that if under class 'A' the steam railroad company is the junior company, it must install at its own expense all safeguards, thus applying the rule of just compensation for which we contend: whereas, under class 'B,' even though the steam road be the junior one, and the sole cause of the danger, it may be wholly relieved (in substance) from any expense.

The cases are quite numerous in support of the proposition, that it is not enough that notice of some kind be actually given. The constitutional guaranty of 'due process of law' requires that that statute must, in direct terms, provide for and require notice.

Siefert vs. Brooks, 34 Wis., 443;
State vs. Fond du Lac, 42 Wis., 287;
Whitefore vs. Probate Judge, 53 Mich., 130;
Stuart vs. Palmer, 74 N. Y., 183;
Kuntz vs. Sumption, 2 L. R. A. (Ind.), 655;
Baltimore vs. Seneca Co. Treas., 1 West. R., 94;
Lewis Eminent Domain, 368;
Garvin vs. Daussman, 114 Ind., 429.

No case can be found which holds that such a proceeding is valid without notice, and all cases hold that notice must be required by the express terms of the act or by necessary implication and this necessary implication must not arise because of the constitutional requirement of 'due process of law,' but one arising from an interpretation of the language of the statute."

In conclusion, we beg to say that we believe that the finding of the Railroad Commissioner is in violation of the rule heretofore laid down by this court, as to the

obligation of the junior road to install and maintain safety devices; that the section of the statute under which the action is taken, and the action itself, deprive the relator of its property without due process of law, and denies it the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States, and that the same is the taking of defendant's property without just compensation.

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